

Before the
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

In the Matter of)
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Rules and Regulations Implementing the) Prerecorded Message EBR Telemarketing,
) Project No. R411001
Telemarketing Sales Rule)
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The Heritage Company, located at 2402 Wildwood Avenue, Suite 500, Sherwood, Arkansas 72120, hereby submits comments to the Federal Trade Commission (FTC) on the matter of Prerecorded Message EBR Telemarketing, Project No. R411001. The two specific aspects of the Telemarketing Sales Rule (TSR) addressed by these comments are the proposed rule changes that would lift the prohibition against prerecorded sales calls to consumers with whom a company has an existing business relationship (EBR) and changing the definition of the abandonment rate requirements from three percent per day per campaign to three percent per month.

1. We support the Commission's decision to treat the request from Voice Mail Broadcasting Corporation (VMBC) as a petition to amend the TSR. We support the position that telemarketers (and telefundraisers—Heritage conducts telefundraising campaigns for over 100 nonprofit agencies) should be able to place prerecorded calls to customers with whom they have an existing business relationship (EBR) for reasons described below:
 - a. Prerecorded calls are more efficient than those conducted by live agents for the simple reason that the calling entity does not have to pay the labor costs of having multiple agents making live calls. In our niche of nonprofit telefundraising, when we are more efficient, we are better able to turn over a larger portion of the funds we raise to our nonprofit partners. Thus, this rule change would benefit both for-profit companies like ours and also charities for whom we work.
 - b. Allowing prerecorded calls to customers with whom a company has an EBR would not place additional costs or requirements upon consumers. Indeed, consumers are less burdened by an automated call than they are by one made by a live agent because they can quickly hang up on an unwanted automated call without the concern of being rude to a live caller (as automated political calling has demonstrated).
 - c. Consumers have been granted the ability to make entity-specific do not call requests which supersede the EBR safe harbor. Indeed, the entity-specific do not call authority predates the National Do Not Call Registry (NDNCR) by several years. However, requiring a prerecorded call to broadcast do not call information at the

outset of the call could serve as a major deterrent against using the prerecorded call at all and is highly problematic for a number of reasons:

- i. A scheme that enabled consumers to put their phone number on an entity-specific do not call list by the press of a button at the outset of a prerecorded call would likely result in a large number of such requests—which would be counterproductive for the seller. This situation would be made worse by the fact that having such a system at the outset of the message could result in consumers making do not call requests and not knowing what company with whom they do business was calling.
- ii. By creating a scheme that would artificially result in do not call requests, this aspect of the rule would in fact deter companies from using the tool of prerecorded messages.
- iii. Especially in the case of calls made on behalf of nonprofits who enjoy protected speech, the requirement of do not call language at any point in the call absent the consumer's request is compelled speech. The Supreme Court has held in four cases in the last 21 years (*Village of Schaumburg v. Citizens for a Better Environment*, (1980); *Secretary of State of Maryland v. J.H. Munson Company, Inc.*, (1984); *Riley v. National Federation of the Blind*, (1988), and *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc. et al.* (2003)) that charities enjoy protected free speech rights beyond that provided to commercial speech. As the Tenth Circuit Court of Appeals made clear in its 2004 *Mainstream Marketing v. FTC* decision (which was allowed to stand by the Supreme Court, effectively upholding that decision), the federal government has the authority to regulate commercial speech, most prominently through the NDNCR. That decision explicitly did not take a position regarding the constitutional status of a do not call registry that included political and charitable calls. However, since the Commission chose to exempt calls for charities from the NDNCR, there is precedent for recognizing and protecting the free speech rights of charities in the area of prerecorded solicitations.
- d. Industry research demonstrates that consumers think more favorably about charitable fundraising calls than they do commercial calls. Similarly, there is at least anecdotal evidence that consumers think differently about calls that are automated than they do calls made by actual people. For that reason, consumers would be less likely to make an entity-specific do not call request to a company with whom they do business if they were called by a live agent than if they received a prerecorded call that empowered them to easily get on a do not call list. In other words, many consumers merely would not want to be called by a machine, while remaining open to calls by live agents. For this reason, a workable solution could be to allow companies to continue to make calls by live agents to their EBR customers who make do not call requests to their automated calls in the absence of an entity specific do not call request to the live agent.

2. We support The Direct Marketing Association's (DMA) request to substitute a "per 30-day period" for the current "per day per campaign" method of measuring the maximum allowable rate of call abandonment under the existing safe harbor in 16 CFR 310.4(b)(4)(i).¹ The reasoning for this position includes:
- a. We stipulate that complying with abandonment rate requirements has been a technological challenge, but our company chose to abide by an abandonment rate of three percent well before the federal requirements went into effect in 2003. Our predictive dialing system was developed internally.
 - b. We represent over 100 nonprofit agencies in our telefundraising campaigns. Developing the per-campaign-per-day capabilities required a major investment of time and effort on our part, and has been a detriment to our efficiency. A scheme allowing a 30 day period in which to calculate the abandonment rate would allow us to be more efficient while having no meaningful impact upon the population of donors and prospective donors whom we call.
 - c. For companies that use predictive dialers, high reach rates are vital to the success of the outbound campaign. Thus, having the freedom to run a higher abandonment rate at times when customers are less likely to be home (such as 8:00 a.m. to 5:00 p.m.) and lowering it when people are more likely to be home (such as 6:00-9:00 p.m.) would make an outbound campaign more efficient. While this approach could theoretically be used under the three percent per campaign per day system, it would be far more difficult to manage without significantly risking being over the three percent threshold. However, having a larger window of 30 days to work with would allow marketers to manage their calls across an entire month, better allowing them to meet the three percent requirement without increasing the abandonment rate on any targeted group of customers—save those who are not home at the time of the call, who are certainly not harmed in any way by the call.²
 - d. Changing this rule to match the Federal Communications Commission (FCC) rule in terms of abandonment rates would provide the teleservices industry with clear, consistent boundaries of acceptable outbound campaigns. Since the Memorandum of Understanding between the two commissions left this difference intact, this rule change would address the largest outstanding difference between the two sets of rules.

¹ In the interest of disclosure, The Heritage Company is a member in good standing of The DMA.

² It was posited by the American Association of Retired Persons during the rulemaking process of 2002-03 regarding the NDNCR that abandoned calls made some senior citizens think that someone was calling to see if anyone was home so they could burglarize their home. The Caller ID requirement in the rules was intended to address this situation, and would continue to do so under the proposed new abandonment rate scheme.

We appreciate the opportunity to publicly submit comments on these important rules affecting the teleservices industry.

For the company,

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